SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joel A. Mdw PART 11
Justice

Index Number : 650733/2012
HSBC BANK USA, NATIONAL
vs.
LEIBMAN, MICHAEL
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: August 21, 2013

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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HSBC BANK USA, NATIONAL ASSOCIATION,
Plaintiff,

INDEX NO. 650733/12

-against-

MICHAEL LEIBMAN,
Defendant.

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JOAN A. MADDEN, J.:

In this action, plaintiff HSBC Bank USA, National Association ("HSBC") sues to recover the balance due on a Business Revolving Line of Credit, which was guaranteed by defendant Michael Liebman ("Liebman"). HSBC now moves for summary judgment on its claim for $26,025.33, the balance due on the Business Revolving Line of Credit as of January 4, 2007, together with interest from that date and costs and disbursements. Liebman opposes HSBC's motion and cross moves for summary judgment dismissing the claims against him on statute of limitation grounds.

Background

In May, 2005, M & M Safe America Corp. ("Safe America"), a New York corporation that manufactured steel bumper guards for the trucking industry, applied for a Business Revolving Line of Credit (the "Credit Line" or the "Credit Account") with HSBC. At the time Safe America completed the application for a Credit Line (the "Credit Application") and signed a Business Lending Agreement ("BLA"), Liebman was the President of Safe America and agreed to be the Guarantor of the Credit Line. Specifically, under Part III of the BLA, Liebman agreed to "unconditionally guarantee full payment to [HSBC] of all Debt...[as well as] full and prompt performance of [Safe America's] obligations to you with respect to the debt [and]

...accrued interest...and all legal fees and expenses." Debt is defined as "all loans and other obligations of [Safe America] owes or will owed to [HSBC]."

The BLA provides that interest on the Credit Account is "payable monthly and on the date that the unpaid balance is paid in full." Credit Application, Part I, Section 3. However, the BLA does not specify a date on which any amount borrowed must be repaid. Rather, it states that either HSBC or Safe America "may cancel this Account at any time," and that if the account is cancelled, then "[Safe America] must immediately pay HSBC] all [Safe America] owe[s]." Part I, section 3.

Under the BLA, Safe America agreed that "[a]n Advance will...be made to cover any overdrafts in our checking account if there is enough availability under our Credit Line to cover the full amount of the overdraft...All Advances will be made at [HSBC's] sole discretion." Part I, section 2. The BLA also provides that Safe America will be billed on a monthly basis and gives Safe America 30 days after receiving the statement to object to any statement. Additionally, the BLA specifies that upon the occurrence of certain events of default, including the failure of Safe America to make timely payments to HSBC or the breaking of any promise in the Credit Application by Safe America, including to change the way Safe American does business, HSBC may require full payment of any amounts due and owing on the Account. BLA, Part I, section 4.

In conjunction with the Credit Line, Safe America opened a checking account (the "Checking Account") with HSBC, as required under terms of the Credit Application. The Credit Application provides an applicant with the option of authorizing automatic deductions of amounts owed from the applicant's credit account or various other sources; however, this portion of Safe America's Credit Application was left blank.

On May 9, 2005, John W. Kenefick ("Kenefick"), a Senior Vice President at HSBC, wrote a letter to Liebman care of Safe America (the "Acceptance Letter") to inform him that the Credit Application was approved, and that the approved amount of the Credit Line was $25,000. The letter also informed Liebman that pursuant to the letter, Safe America agreed "to maintain

with [HSBC] a demand deposit account from which we may deduct payments owing under your Line [of Credit]."

The Credit Line and the Checking Accounts were linked and it appears from the record that HSBC automatically deducted funds each month from the Checking Account and applied these funds against the Credit Line to reduce the Credit Line balance. HSBC sent monthly billing statements with respect to the Credit Line account ("Billing Statements") to Safe America after the Credit Line was approved.

On or about March 9, 2012, HSBC instituted this action against Liebman, asserting causes of action for breach of contract and an account stated. For each cause of action, HSBC seeks damages in the amount of $26,025.33, together with interest from January 4, 2007, as well as attorneys' fees of $5,205.07. On May 21, 2012, HSBC filed an amended complaint, which differs from the initial complaint in that it specifically designates Leibman as Safe America's guarantor and alleges that he is liable for the amounts owed to HSBC. Leibman timely answered and asserted a defense based on the statute of limitations.

HSBC now moves for summary judgment in its favor in the amount of $26,025.33 with interest from January 4, 2007, together with costs and disbursements. In support of its motion, HSBC presents Billing Statements from the Credit Line, which it alleges were forwarded, received, and retained without any objection. These Billing Statements are for the period from January 2006 to August 2006, the payments that Liebman challenges. The Billing Statements reflect that the Checking Account had insufficient funds to cover the payments, thus triggering an overdraft and that the overdraft was covered from money drawn from the Credit Line.

The latest Billing Statement provided lists a "Billing Date" of January 3, 2007, and a "Total Balance in Use" of $26,025.33. HSBC also asserts that Leibman agreed to act as guarantor of any sums due to HSBC pursuant to the Credit Agreement. HSBC argues that, based on the above, there are no issues of fact which need to be determined in order to establish its

right to summary judgment on the issue of liability for the amount of $26,025.33, together with interest from January 4, 2007.

Liebman opposes the motion and cross moves for summary judgment. While Liebman does not dispute any of the facts asserted by HSBC, Liebman argues that this action is untimely under CPLR 213(2). Liebman argues that the Credit Agreement is effectively a demand note and that the statute of limitations on a demand note begins to run at the time the note is executed which, in this case, was more than six years prior to the commencement of this action.

Alternatively, Liebman argues that the statute of limitations in this action on a guaranty began to run at the time Safe America first defaulted on its obligations under the Credit Agreement and that multiple defaults occurred prior to March 9, 2006, and therefore the action is untimely. Specifically, Leibman argues that Safe America defaulted on its obligation to make timely payments with respect to the Credit Line in December 2005, when the Checking Account no longer had sufficient funds to pay the minimum amounts due and owing on the Credit Line. Liebman asserts that beginning in December 2005, HSBC engaged in a pattern of "self-payment" by "transferring money from the Credit Line to the Checking Account to pay back the Credit Line." Liebman Aff. ¶ 10 In support of this contention, Leibman submits a monthly statement for the Checking Account covering the period from December 1, 2005, through December 30, 2005, which shows that HSBC debited the Checking Account to pay the monthly amount due on the Credit Line, thus creating a negative balance and that HSBC advanced funds from the Credit Line and deposited funds in the Checking Account to cover the overdraft. He also asserts that the Billing Statements show that by January 3, 2006, Safe America had drawn a total of $23,804.45 against the $25,000 Credit Line and that HSBC thereafter used the remaining availability under the Credit Line "to pay itself."

Leibman also argues that in addition to the December 2005 default, Safe America defaulted on its obligations under the BLA on February 24, 2006, when Safe America "sold its remaining assets, ceased operations, and went out of business" (Liebman Aff. at ¶11). Liebman

asserts that these actions constitute an event of default since, under the BLA, a breach of a promise is an event of default and that by going out of business, Safe America breached its promise not to change the way it does its business.

In reply and opposition to the cross motion, HSBC points out that Liebman does not contest any of the underlying assertions of fact in the motion. HSBC also argues that the Credit Agreement is an installment contract based on a formula set forth within the Agreement and that the statute of limitations on this contract began to run when Safe America failed to make its monthly payments. HSBC maintains that Safe America first failed to make its monthly payments in May 2006, and that a payment was made from the Checking Account on April 28, 2006. As such, HSBC argues that Safe America was not in default until May 2006, which is within the limitations period for this action. HSBC also asserts that the facts do not support Liebman's claim that HSBC was out of business in February 2006, as the Checking Account was still open and it submits records from the New York Department of State Division of Corporations indicating that Safe America was dissolved in 2007. HSBC also argues that the limitations period could not have commenced in February 2006, even if Safe America went out of business at that time, since HSBC was not notified that Safe America was making any change in its business.

In his sur-reply, Leibman reiterates his argument that HSBC has conceded that the statute of limitations with regard to a guarantor's obligation begins to run from the date of the default on the underlying obligation. Liebman argues that an event of default occurred in December 2005, when Safe America failed to maintain a sufficient balance in the Checking Account to cover amounts owed on the Credit Line. In support of this assertion, Leibman notes that the December 2005 statement shows that Safe America had a negative balance in its Checking Account as of December 31, 2005. With regard to HSBC's assertion that payments were made until at least April 28, 2006, Leibman asserts that the payment made from the Checking Account in April

2006, was not actually a payment from Safe America, rather, it was a payment made by HSBC to itself from the Checking Account.

Liebman alternatively asserts that, at the very latest, a default occurred in February 2006, when Safe America went out of business. In support of his position, he submits a "Register Report" from Safe America's accountant which shows that the last two checks on Safe America's account were written on February 26, 2006, and a New York State Sales Tax Return for Safe America marked "Final Return" for the fiscal year ending February 28, 2006.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

HSBC has made a prima facie showing of entitlement to judgment as a matter of law by showing the existence of the revolving credit agreement and guaranty, the unconditional terms of repayment, and the default of Safe America and Leibman thereunder as evidenced by the monthly statements of account. See Sce v. Ach, 56 A.D.3d 457 (2nd Dep't 2008)(citations omitted). The burden then shifts to Leibman to raise a triable issue of fact. Leibman's sole argument in opposition to HSBC's motion is that there is at least an issue of fact as to whether the statute of limitations has expired on HSBC's claims.

CPLR 213(2) establishes that an action upon a guaranty must be commenced within six years. Contrary to HSBC's position, the Credit Agreement is not an installment contract but is more akin to a demand note, as it specifically authorizes HSBC to demand full payment of the balance on the Credit Line and requires Safe America to immediately pay the balance owed upon

such demand. See generally, National Westminster Bank USA v. Vannier Group, 160 A.D.2d 348, 350 (1st Dep't 1990).

While it has been held the six-year limitations period for a demand note typically begins to run at the time of its execution (see Sce v. Ach, 56 A.D.3d 457), the limitations period on a guaranty does not start to run until the debtor defaults on the underlying debt. Seoulbank, N.Y. Agency v. D&J Export & Import Corp., 270 A.D.2d 193 (1st Dept 2000)(limitations period on guaranty does not commence until the principal is in default); Marine Midland Bank, N.A. v. Perlstein, 175 A.D.2d 523 (3d Dept 1991)(holding that six year limitations on guaranty of payment on line of credit began to run upon borrower's default); North Fork Bank v. Healy, 224 A.D.2d 601 (2d Dept 1996)(same). In addition, a debtor's partial payment of either principal or interest renews the limitations period under circumstances that evince an acknowledgment of a continuing promise to pay the balance on the note. Skaneateles Sav. Bank v Modi Assocs., 239 A.D.2d 40 (4th Dep't 1998), lv denied 92 N.Y.2d 803 (1998); see also, Korea First Bank of New York, 262 A.D.2d 74 (1st Dept 1999)(action against guarantor was timely commenced within six years of debtor's last partial payment on the underlying promissory note).

The central issues here are (1) whether a default occurred in December 2005, when the Checking Account had a negative balance and, if so, (2) whether the monthly amounts paid by HSBC debiting of the Checking Account were sufficient to evince an intent by Safe America to satisfy its obligations to pay the balance due and owing under the Credit Line such as to renew the statute of limitations period. As neither of these issues can be resolved based on the record before the court, summary judgment may not be granted to either side. In particular, issues of fact exist, *inter alia*, as to whether the circumstances under which the payments were debited from, and advances from the Credit Line were deposited into, the Checking Account, show that Safe America authorized or acquiesced in the payments such that the negative balance in the Checking Account could not be considered a default. In the alternative, if such negative balance did constitute a default, issues of fact exist as to whether the manner in which payments were

made on or after December 2005, evinced an intent by Safe America to satisfy the obligations under the Credit Line thus renewing the limitations period.

As for Liebman's argument that the default occurred in February 2006, when it went out of business, there is no evidence that it informed HSBC of this fact. Moreover, as this action relates to Safe America's default in payment under the Credit Agreement and not to its breach with respect to its agreement to stay in business, this default would not commence the running of the limitations period.

Accordingly, the motion for summary judgment is denied, and the cross motion to dismiss on statute of limitations grounds is denied.

Conclusion

In view of the above, it is

ORDERED that the motion [redacted] for summary judgment is denied; and it is further

ORDERED that the cross motion for summary judgment is denied; and it is further

ORDERED that the parties shall appear on October 3, 2013, at 9:30 am. for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY 10007.

Dated: August 27, 2013

J.S.C.